

Judiciary Committee Public Hearing

RAISED BILL NO. 6573

**AN ACT REQUIRING DNA TESTING OF CERTAIN ARRESTED
PERSONS.**

March 6, 2009

**TESTIMONY OF EDWARD J. GAVIN, PRESIDENT OF
THE CONNECTICUT CRIMINAL DEFENSE LAWYERS
ASSOCIATION, IN OPPOSITION TO AN ACT
REQUIRING DNA TESTING OF CERTAIN ARRESTED
PERSONS.**

Chairman McDonald, Chairman Lawlor, and Distinguished Members of the
Judiciary Committee:

The Connecticut Criminal Defense Lawyers Association (CCDLA) is a statewide organization of approximately 350 licensed lawyers, in both the public and private sectors, dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by ensuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally and that those rights are not diminished. At the same time, CCDLA strives to improve and suggest changes to the laws and procedures that apply to criminal justice.

**CCDLA OPPOSES THE TAKING OF A BLOOD OR OTHER
BIOLOGICAL SAMPLES FOR DNA ANALYSIS FROM
INDIVIDUALS ARRESTED, BUT NOT YET CONVICTED, FOR
THE COMMISSION OF A FELONY.**

CCDLA opposes the taking of blood or other DNA samples from individuals *arrested but not convicted* of a felony offense. This proposed process is in direct conflict to the State and Federal constitutional guarantees that those who are arrested are presumed innocent.

The proposed legislation provides in relevant part:

Section 1. Section 54-102g of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2009):

(a) Any person who is arrested on or after the effective date of this section for the commission of a felony shall, prior to release from custody and at such time as the law enforcement agency that arrested such person may specify, submit to the taking of a blood or other biological sample for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person.

CCDLA recognizes that there is a long-standing policy for law enforcement agencies to take fingerprint samples from arrestees for *identification* purposes. Raised Bill 6573 allows law enforcement to expand the process to collect DNA samples of individuals that have not been convicted of any crime. By law, arrestees are innocent citizens. The taking of DNA samples of arrestees is intrusive, unnecessary for identification purposes, is ripe for abuse by law enforcement officials, permits trolling of genetic markers for family members of arrestees (familial searching), risks the permanent retention of DNA material of innocent citizens, affects Juvenile arrestees, and provides unprecedented access to the private lives of innocent people.

NATIONAL STATISTICS:

According to the February, 2009 study conducted by the **National Conference of State Legislatures**, all 50 states currently require that convicted sex offenders provide a DNA sample, and states are increasingly expanding these policies to include all felons or many serious felony offenders. To date, 46 states require that all convicted felons provide a DNA sample to the state's database.

Eleven states to date specify certain misdemeanors among those who must provide a DNA sample. Some are misdemeanors for which sex offender registration is required; others states specify certain sex offenses or child victim offenses.

Fifteen states, Alaska, Arizona, California, Kansas, Louisiana, Maryland, Michigan, Minnesota, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Texas and Virginia, now have laws authorizing arrestee sampling. The Texas law allows post-indictment samples of certain sex offenders. Minnesota's passed in 2005, similarly requires a DNA sample after probable cause determination in a charge of one of many serious felonies. Tennessee also will take DNA from arrestees in violent felonies upon the finding of probable cause. California's Proposition 69, approved by voters on November 2, 2004, requires DNA samples of adults arrested for or charged with a felony sex offense, murder or voluntary manslaughter, or attempt of these crimes. Starting in 2009, the measure requires arrestee sampling be expanded to arrests for any felony offense. The same measure expanded DNA testing to all convicted felons. In 2006, Kansas added the requirement that felony or drug sentencing guidelines grid level 1 or 2 crime arrestees provide a DNA sample; and will expand in mid-2008 to all felony arrestees. New Mexico also enacted arrestee samples from specified violent felons in 2006.

DNA data bases in all states today are connected to the National DNA Index System, which is run by the Federal Bureau of Investigation for federal and state information sharing.

PRIVACY ISSUES INVOLVING DNA SAMPLES:

An excellent analysis of the privacy issues surrounding the collection of DNA samples was published by the American Constitution Society in August 2007. In their article, "**A New Era of DNA Collections: At What Cost to Civil Liberties?**", Tania Simoncelli, Science Advisor in the Technology and Liberty Program at the American Civil Liberties Union, and Sheldon Krimsky, Professor of Urban & Environmental Policy & Planning, School of Arts and Sciences at Tufts University, describe the increasing use by law enforcement of DNA databanks and express concern about the civil liberties ramifications of this expansion. The authors findings include the following comments.

A. DNA COMPARED TO FINGERPRINTS:

A persons DNA contains a vast amount of information. Those who argue vigorously for collecting and databanking DNA often compare this process to that of collecting and databanking fingerprints. However, fingerprints differ significantly from biological samples that provide DNA. Fingerprints are two-dimensional images of the raised portion of the epidermis of the fingertips. All of the information available from a fingerprint is there to be examined visually once the impression is made of the finger or the copy of the impression left by someone on an object is made. Using the visible individualized characteristics of a fingerprint, it can be used fairly effectively to identify a person.

By contrast, DNA, which must be extracted from a tissue sample and mined for data, contains exactly the kind of information that raises privacy and other civil liberties concerns. Research conducted to expand our knowledge of what can be revealed by

felons have a diminished expectation of privacy, as balanced against societies need to promote law and order. Arguably, the role of DNA databanks for convicted felons is for precise identification and for helping police solve recidivist crimes.

CCDLA believes that the mandatory extraction of DNA samples from arrestees violates basic State and Federal fourth amendment rights.

C. EXTRACTION OF ARRESTESS DNA WILL LEAD TO LITIGATION:

A lawsuit was recently litigated in the state of New York that challenging the legality of an offline databank that is being maintained by the New York Medical Examiner's Office. An amicus brief filed by the Innocence Project and the New York Civil Liberties Union asserts that the "linkage database" is inconsistent with state law, which requires expungement of DNA samples from individuals who are acquitted or whose conviction is subsequently reversed on appeal or vacated. It argues that the databank violates Fourth Amendment limitations that prohibit seizures beyond the initial purpose for which the seizure took place and that the database violates Fourteenth Amendment rights of informational privacy and individual autonomy with respect to the use and maintenance of ones DNA. *See* Brief for the New York Civil Liberties Union and the Innocence Project as Amici Curiae Supporting Defendant, People v Hendrix, Indictment No. 3668/03 (N.Y. App. Div. Dec. 30, 2004). The Court issued a permanent protective order regarding it's use.

CCDLA believes that the mandatory extraction of DNA samples from arrestees violates will lead to contested litigation regarding it's enforcement..

CONCLUSION:

CCDLA opposes the taking of blood or other DNA samples from individuals *arrested but not convicted* of a felony offense. DNA databanks should be limited to DNA profiles from persons who are convicted of serious crimes. All those presumed innocent do not have a diminished right to privacy and therefore should not have their DNA included in a forensic DNA databank.

Respectfully submitted,

EDWARD J. GAVIN
PRESIDENT -CCDLA
On behalf of the Connecticut
Criminal Defense Lawyers
Association